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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 8 3

CORNING GLASS WORKS, EMPIRE MACHINE COMPANY, *et al.*,

Appellants,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

REPLY BRIEF FOR CORNING GLASS WORKS, EMPIRE MACHINE COMPANY AND INDIVIDUAL APPELLANTS ASSOCIATED THEREWITH.

THURLOW M. GORDON,
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Introduction.

The Government's brief proceeds on the theory that a monopoly of glass machinery patents illegally acquired and used to monopolize the unpatented product violates the Sherman Act in such a manner as to justify the compulsory licensing of the patents involved and other drastic provisions of the final judgment (Govt. Br., pp. 2, 189-193, 199-201). It has advanced no objections to the basic transactions connecting Corning and Empire to this case which have not already been met in our main brief.*

Our reply will, therefore, be primarily directed at demonstrating that the Government has not succeeded in supporting the application of the final judgment to the

* We also rely upon our main brief for the correction of the statement that Corning owned or controlled a 43% interest in Hartford (Govt. Br., pp. 254, 193).

patents owned by Corning regardless of the legality of the matters complained of. We shall also discuss the failure of the Government brief to meet our objections to Section 29(f) and Section 33 of the final judgment.

POINT I.

The Government has failed to justify the application of the final judgment to the patents owned by Corning.

1. The Government's brief does not contend that any Corning patent has been illegally acquired.

The Government devotes a considerable portion of its brief to urging that some of the basic Hartford patents have been obtained by unlawful means. The use by Hartford of the Clarke article, the suppression of the Hitchcock demonstration, and the allegedly illegal Patent Office practices of Hartford and Owens are the chief support for this contention.

None of these matters concern any of Corning's patents.

2. The Government's brief does not contend that the patents owned by Corning constitute an illegal aggregation.

No Corning patented invention was ever used by Hartford. Corning's patents have been used only in the non-container industry, which the Government has repeatedly conceded to be separate and distinct from the glass container industry.*

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* Complaint, Par. 29, R. I-9; Stip., Ex. 1568, R. XI-8037. The answers of neither Corning nor Empire contradicted the separation of the container industry from the non-container industry, but sought instead to correct the Government's use of the term "pressed and blown" glassware as denominating the non-container industry. R. I-325, 341. Separation of the two industries is also recognized by the Bureau of the Census (Ex. C-5668, R. XXVI-15389).

Conversely, the only patents that Corning ever received as the result of any transaction complained of by the Government in this case were the Howard autoblow, the Peiler punty and the Smith re-issue patents transferred from Hartford to Corning in connection with the settlement negotiations in 1940. These patents were alleged to read on Corning machines. Two have expired. The Smith re-issue patent will expire six years before the patent on Corning's turret chain machine upon which it is claimed to read. The Government seems to have no objection to dedicating this patent to the public (Govt. Br., p. 413).

The argument in the Government's brief that compulsory licensing was validly extended to Corning's ribbon machine does not controvert these essential facts. The ribbon machine is admittedly the product of Corning's own research. The Government expressly disclaimed any aggregation of patents with respect to the ribbon machine. Its brief urges that it should not be bound by this admission, but significantly does not go further to urge that such aggregation in fact exists.

POINT II.

The *St. Louis Terminal* case has no application in view of the cancellation of the 1922 Glass Contract.

In *United States* v. *Terminal R. R. Ass'n*, 224 U. S. 383; 236 U. S. 194, the physical conditions existing in the City of St. Louis were such that only a few approaches to the city were possible. A combination of railroads to build a union terminal—which included all of these approaches—was held to be in violation of the anti-trust laws. As a result, the court ruled that the parties must either

(1) *dissolve* the combination, or

(2) if they desired to *continue* they must permit the other railroads to come in upon reasonable payment therefor.

The important thing about that case is that *there was no requirement that the parties continue the combination.* They had a right to withdraw.

So here, if there has been any illegal combination, Corning should have a right to withdraw from that combination —and it has irrevocably done so—by cancelling the 1916 agreement and the 1922 Glass Contract.

Indeed, the court itself has cancelled the 1916 agreement and the 1922 Glass Contract and has forbidden Corning to enter into any similar agreements in the future.

Thus the court itself, to use the analogy of the *Terminal* case, has taken the terminal apart. Having done so, there is no reason why it should impose obligations upon Corning based on the assumption that the *aggregation* of patents still continues.

POINT III.

The Government's suggestion as to the proper interpretation of Section 29(f) of the final judgment.

As pointed out in our main brief (p. 55), Section 29(f) of the final judgment imposing an unrestricted Robinson-Patman Act upon the appellants was applied to Corning in the absence of any evidence that Corning ever engaged in discriminatory selling practices. In answer to our objections, the Government's brief does not state that Corning ever has engaged in any practices such as would necessitate the application of Section 29(f) to it. It merely urges that

this provision should be interpreted to apply only to "unfair" discrimination, whatever that may mean. If such is the case, it would still be impossible for Corning to guess what differences in price to different customers would or would not be permissible.

If, however, all the Government means is that the paragraph should be construed as merely forbidding Corning to violate the Robinson-Patman Act, it falls squarely within the holding of this Court in *Swift & Co.* v. *United States,* 196 U. S. 375, that general decrees are not permissible which render the defendant subject to contempt for all possible violations of the anti-trust laws.

This provision should not be modified with respect to Corning, but its application to Corning should be eliminated altogether. It has no justification either in law or in the facts of this case.

POINT IV.

The individual appellants should have five years after the effective date of the final judgment in which to dispose of their Hartford stock.

Our argument on this point is found at pages 64 to 65 of our main brief. The Government does not seriously contest our request that the individuals concerned be permitted five years from the effective date of the judgment in which to dispose of their Hartford stock (Govt. Br., p. 401). It merely urges that those individuals have been on notice since the filing of the complaint that the District Court might order them to dispose of their Hartford stock.

It has been impossible to attribute a certain or fair value to the Hartford stock since the filing of the complaint herein, and this uncertainty will continue for some time after

the disposition of this appeal by this Court. In view of that fact and in view of the uncertainties arising out of the war, we respectfully request that the individual appellants be given five years from the effective date of the judgment in which to find a market for their Hartford stock. If it deems it necessary, this Court could enjoin the voting of that stock or trustee it pending its disposition.

Respectfully submitted,

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REPLY BRIEF FOR CORNING GLASS WORKS, *ET AL.*, ON REARGUMENT.

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Introduction.

The order of the Court requesting this reargument states that the Court does not desire further argument concerning the substantive violation of the anti-trust laws. Although Corning vigorously disputes the substantive contentions advanced by the Government on this reargument, it must rely for their refutation upon its briefs on the prior argument.

The Government's brief fails completely to answer the Corning argument in the joint brief (Appellants' brief, pp. 38-45). That part of the Government's brief (Gov't brief, pp. 18-26) which is addressed to the Corning argu-

ment merely restates the manner in which Corning is claimed to have violated the law and then concludes that neither Corning nor Corning's patented machines should be excluded from the judgment. This does not meet the issue now before the Court, because Corning did not argue that it should be excluded from the judgment, assuming the merits of the case to have been resolved against it. Nor, as stated by the Government, did Corning misconceive the basis of the final judgment, i.e., the necessity to destroy the alleged power obtained through the unlawful aggregation of patents (Gov't brief, p. 19).

On the contrary, on its argument Corning expressly assumed the broadest substantive claim advanced by the Government either in the court below, on the prior argument, or on this reargument, namely, the existence of an illegal patent pool of container and non-container patents (Appellants' joint brief, p. 40). Corning further assumed that, in order to destroy any power obtained by Corning through the alleged unlawful aggregation of patents, it was proper to cancel and enjoin the observance of the 1922 agreement (Appellants' joint brief, p. 39).

The issue now before the Court is what further relief should be applied. This is a matter of tremendous importance to Corning. Corning's argument is that none of its machines or patents can properly be subjected to compulsory licensing. The statement at page 24 of the Government's brief that "For the same reason that Hartford is required to license its patents, Corning should be subjected to the same relief" clearly shows the weakness of the Government's argument for the compulsory licensing of Corning's patents. The statement is unsupported either by what goes before it or by what follows it. Corning's argument in the joint brief was directed at establishing the

impropriety of this relief so far as concerns Corning, and the Government has entirely failed to meet that argument.

The Government has not succeeded in justifying the application of compulsory licensing to Corning's patents.

To the legal doctrine that co-conspirators are jointly responsible for the illegal acts of any conspiracy in which they participate, Corning makes no reply. The typical application of this doctrine is in connection with the establishing of guilt in criminal cases or of responsibility in civil cases. While this doctrine might support the proposition that all conspirators should be equally enjoined from repeating violations of the law in which any of them are found to have participated, it can have no application where it is necessary to mold additional affirmative relief to deal with specific results of the conspiracy remaining in only one or more of the conspirators.

Although the Government appears to argue that compulsory licensing and other affirmative provisions of the judgment applicable at most only to one or more appellants, because of the peculiar facts with respect to such appellants, may by this rule alone be applied to all appellants, regardless of their differing positions, it obviously cannot mean what it says.

If the Government really meant what it appears to say, each corporate appellant would be in receivership. In fact, the receivership provisions were applied to Hartford alone because of the unique factual situation remaining with respect to Hartford even assuming all the injunctive provisions to be in effect.

Were the Government's argument correct, this Court would hardly have called for further argument with respect

to the provisions of the judgment "as those provisions apply to the corporate and individual appellants respectively", nor have requested only that objections going to several defendants be jointly briefed and argued. The order of the Court clearly recognizes that different provisions of the judgment may be applicable to different appellants.

Compulsory licensing is based on the necessity to dissipate consequences.

The Government's whole argument with respect to compulsory licensing is in fact based upon the consequences allegedly remaining with respect to particular appellants after the injunctive provisions have been fulfilled. There is no more reason for attributing the necessity for the neutralizing of these consequences to all appellants than for attributing the necessity for a receivership to all appellants.

The Government argues that the District Court was entitled "to enjoin each of the appellants from repeating any of the unlawful acts for which all of the appellants were jointly responsible and to order each of the appellants to take such affirmative action as might be appropriate to remove the effects of the conspiracy for which they were all responsible" (Gov't brief, p. 13). The argument may be accepted. The questions remain (a) as to what effects must be removed and (b) what affirmative action is appropriate to remove them.

Again, the Government argues that even if the appellants "should not repeat their illegal conduct, as presumably they will not in view of the injunctive provisions of the decree, the dominance which they have presently achieved as a result of the conspiracy would give them a tremendous advantage over competitors, which can be neutralized only if each is required to make generally available any patents

it may possess . . .'' (Gov't brief, p. 15). The argument assumes its conclusion. Obviously it must still be determined what dominance must be neutralized, and how.

No consequences remain in Corning which justify the compulsory licensing of its patents.

The consequences relied upon by the Government in justification of compulsory licensing may for convenience be classified as the illegal aggregation of patents allegedly remaining after the injunctive provisions of the judgment have been fulfilled, and the alleged illegal monopoly of and dominance over unpatented glassware.

(a) The alleged illegal aggregation of patents.

The combination of unexpired patents which the Government claims resulted in illegal dominance and monopoly is said to have included 48 patents contributed by Empire (Gov't brief, p. 73). These patents were transferred to Hartford in 1922 when Empire was substantially merged with Hartford-Fairmont. The effect of the judgment upon them is Hartford's concern, not Corning's.

The Government goes on to say (Gov't brief, p. 73, fn. *b*.) that the pool also included an unstated number of Corning patents by reason of the exclusive license from Corning to Hartford under the 1922 agreement. This contract is, moreover, the only way in which Corning is claimed to have contributed to the pool (Gov't brief, p. 107, Appendix II, p. 250).

After reciting the duty of the District Court to nullify the power of the alleged combination and quoting from *Standard Oil Company* v. *United States,* 221 U. S. 1, the Government brief states:

> "In the instant case a judgment that cancelled existing contracts and enjoined the repetition of the

> past unlawful acts of appellants *but did not affect the patent combination* would have left untouched the very concentration of economic power that it was the duty of the court to rectify'' (p. 76).*

Again the Government's argument may be accepted. The fact is that paragraph 27 of the judgment, cancelling and enjoining the observance of the 1922 agreement, did ''affect the patent combination'' in so far as Corning is concerned, by completely dissolving the combination (Appellant's brief, p. 40).

The Government reasons from dissolution cases (Gov't brief, p. 77), and seeks to support compulsory licensing as a substitute for dissolution where dissolution is impracticable or inappropriate, citing *United States* v. *Terminal R. R. Association,* 224 U. S. 383; *United States* v. *Great Lakes Towing Co.,* 208 Fed. 733; and *United States* v. *New England Fish Exchange,* 258 Fed. 732.

In the case of Corning, neither the District Court nor the Government concluded ''that dissolution and divestiture were not practical remedies'' or that ''it was necessary to leave the patents in the ownership and subject to the control of the persons who had formed the patent combination * * *'' (Gov't brief, p. 85). The judgment, both as submitted by the Government and as signed by the District Court, provided for the cancellation and enjoining of the 1922 agreement, thus recognizing that dissolution and divestiture were entirely practical remedies with respect to Corning.

The argument that dissolution is impractical and compulsory licensing therefore necessary (Gov't brief, pp. 78-86) is addressed to the interlocking patent situation in the container industry and primarily to Hartford. Whether

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* Italics supplied.

or not any other appellant is left with patents obtained by fraud (Gov't brief, pp. 108-112, and p. 130) or whether or not other appellants are left with patents illegally acquired (Gov't brief, pp. 112-115, and p. 131) have nothing to do with Corning's patents.* Similarly, whether or not it is practical to divest Hartford and others of their patents (Gov't brief, pp. 78-86), Corning's patents are divisible and stand separated from the combination on a practical basis by paragraph 27 of the judgment and the voluntary cancellation of the 1922 agreement.

The remainder of the Government's argument in support of compulsory licensing is concerned with illegal monopoly and dominance of glassware.

(b) The alleged monopoly or dominance of glassware.

The Government states at pages 127-8 of its brief:

> "In this case the government supports the provisions of the decree not by reliance on any asserted general principle that every patent owned by any person who has violated the anti-trust laws must be cancelled or licensed royalty free.[**] The remedy is

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* The Smith re-issue patent, transferred from Hartford to Corning in connection with the attempt to settle the case before trial, has not yet expired, but the Government has no objection to its dedication to the public (Gov't brief, p. 191). The other two patents, Howard auto-blow and Peiler punty, have expired. As to them the Government says the case is moot (*ibid*).

** Compare the assertion at page 107 of the Government's brief that, since all the patents in the combination have been misused, they may not be enforced. This assertion is clearly incorrect. Even the application of the doctrine set forth in *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495; *Morton Salt* v. *Suppiger Co.*, 314 U. S. 488; *Mercoid Corp.* v. *Minn. Honeywell Regulator Co.*, 320 U. S. 680, and *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, would not go so far. The Government in its brief, at page 128, says: "The cases hold that a patent owner who has misused his patent cannot enforce it at least until the consequences of his misconduct have been fully dissipated."

appropriate here because the patents were combined to monopolize an entire industry, because the present existence and ownership of the patents is itself one of the consequences of the conspiracy, and because neither dissolution of Hartford nor divestiture of the patents is an adequate or feasible way to dissolve the patent combination or to dissipate its economic effects."

As shown above, the alleged illegal combination of patents has been dissolved insofar as it included Corning's patents, and Corning has no patent which is a consequence of the conspiracy. The only thing that remains is the question of the dissipation of the economic effects of the combination.

Container ware.

There are no consequences in the container industry upon which the Government can rely for the compulsory licensing of Corning's patents. Corning, as we showed in our main brief, has never been in the container industry.*

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* The Government's brief (page 22) refers to the fact that Corning made some tumblers on the ribbon machine. Under the stipulations which must govern this case, tumblers automatically made are not containers (Stip., Ex. 1568, R. XI, 8037). By definition, the only tumblers made on the ribbon machine are automatically made. The testimony shows that in 1940 Corning made only $28,500 worth of tumblers (R. VII, 5543) out of its gross business (in 1937) of $19,465,185 (Finding of Fact 80, R. X, 7293). No figure for gross sales for 1940 appears in the record.

Hartford did not have the right to license the ribbon machine for the manufacture of tumblers (Ex. 16, R. XVII, 11943, 11966) because Corning had used it for tumblers itself. Thus the ribbon machine never played any part whatever in Hartford's lease-licensing system.

Moreover, the Government is not satisfied with attempting to classify tumblers as containers when made by Corning. When made by Owens and Hazel, the Government comes over to the other side and states that both Owens and Hazel are in the non-container business as a result of the manufacture of tumblers (Gov't brief, p. 25, fn. 22).

Accordingly, Corning alone of the manufacturing defendants is not adjudicated by the judgment to have violated the anti-trust laws in the container industry. Moreover, the record is entirely clear that Corning's licensing of its patents to Hartford had no perceptible effect upon the container industry (Appellants' brief, p. 39).

Non-container ware.

In the case of the non-container industry, the Government makes the express concession that the only adjudication in the judgment (paragraph 5) with respect to non-container glassware must be modified. This concession appears at pages 36-7 of its brief and reads as follows:

> "Paragraph 5 should be modified, as conceded in our main brief (p. 327), so as (a) to confine to heat-resistant ware the adjudication that Corning, Hartford, and Empire, with the individual defendants associated with each, 'have monopolized' trade in violation of Section 2 of the Sherman Act; and (b) to exclude laboratory, paste mold and electrical ware from the adjudication of attempted monopolization by such defendants."

Appendix I of the Government's brief at page 240 gives the Government's proposed revised version of paragraph 5. This revised version, while it retains the prior adjudications of attempted monopolization and restraint of trade as to the other types of non-container ware, expressly limits the adjudication of monopolization to heat-resistant ware.

In spite of this concession, the Government's brief persists in speaking of Corning as retaining a monopolistic and dominating position in the manufacture of glassware, both container and non-container (e. g., Gov't brief, pp. 19, 76-7, 84, 86, 102 and 131). The Government even goes

so far as to cite in support of these assertions conclusion of law 4 (R. X, 7401) at page 102 of its brief.

Conclusion of law 4 stated among other things that the appellants, including Corning, have maintained monopolies of "the manufacture and distribution of bulbs, signal and optical ware, heat-resistant and chemical-resistant ware, ovenware, and tubing and cane."

This conclusion of law is clearly superseded by the Government's concession with respect to paragraph 5 of the judgment (Appellants' brief, pp. 55-7; Gov't brief, pp. 36-7, App. I, p. 240) as is finding of fact 62 (R. X, 7291). The concession that Corning should not be adjudicated as having monopolized any product other than heat-resistant ware was made in response to Point II (pp. 40-49) of Corning's main brief on the prior argument, to which reference is made again.

It is entirely clear that the reason why the Government has been compelled to make this concession is that it is unable to muster any actual consequences in Corning other than with respect to heat-resistant ware. At pages 5-20 of its brief on its prior argument the Government summarizes the facts upon which it relies in this case. The only consequences attributed to Corning (other than the alleged illegal aggregation of patents dealt with at page 5 above) are stated at pages 8-9 of that brief:

> "As a result of the exclusive licenses contained in this agreement Corning occupied a monopolistic and dominating position with respect to the manufacture and distribution of heat-resistant ware (R. 2998-9)."

This statement is confirmed and again relied upon in the Government's brief on this reargument (p. 131). The

Government cannot go beyond this statement of its position and its modification of paragraph 5.*

As pointed out in the joint brief, however, the adjudication as to heat-resistant ware is based upon the exclusive license from Hartford to Corning to use Hartford patented inventions (Appellants' brief, pp. 43-4). The District Court so found (Finding 62, R. X, 7291). If the monopolization of heat-resistant ware must be dissipated through the compulsory licensing of the patents involved, the patents are Hartford's and not Corning's. On the Government's own theory, the opening of the patents through which the consequences were brought about is the most efficacious remedy. For four years already, since 1940, Hartford has been licensing its patented machinery for the manufacture of all kinds of glassware, including heat-resistant ware.

Whatever else the Government or the Court might fairly feel impelled to do as a result of the adjudication as to heat-resistant ware, it would seem to be beyond dispute that this adjudication does not justify the compulsory licensing of such Corning machines as the ribbon machine.

Conclusion.

Corning is not left with an illegal aggregation of patents. The dissipation of consequences theory advanced by the Government does not justify the compulsory licensing of any of Corning's patents.

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* As the Government makes no reply to the fact that the adjudication should properly be confined to ovenware (Appellants' brief, pp. 56-7), it is assumed that there is no objection to this further modification.

Corning respectfully submits that the judgment should not require the compulsory licensing of its patents.

Respectfully submitted,

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